IN THE HIGH COURT OF JUDICATURE AT BOMBAY
SIDE JURISDICTION
CRIMINAL APPEAL NO.242 OF 2005

Firozkhan @ Kariya Vahidalli Khan
R/o Indira Nagar Hutment,
Behind Faizane Raza Masjid, Near
common Latrine, Bainganwadi,
Govandi, Mumbai 43 ...Appellant.

V/s.

The State of Maharashtra
(through Shivaji Nagar Police Station
C.R.No.71/99) ...Respondent.

Shri R.R.Mahagaonkar, adv. appointed for the Applicant absent.

Smt.V.R.Bhosale, APP for the Respondent/State.

CORAM: J.H.BHATIA, J.
DATE : 10th April, 2007.

ORAL JUDGMENT:

1. The appellant/ accused was convicted by the Additional Sessions Judge, Greater Bombay for the offences punishable under Section 376 of the I.P.C. and was sentenced to undergo R.I. for 5 years and to pay a fine of Rs.500/- and in default to pay fine, to undergo further R.I. for three months in Sessions Case No.1065 of 1999.

2. The appellant has preferred this appeal through jail. Shri Mahagaonkar advocate is appointed by this Court to appear and conduct appeal on behalf of the

appellant, but unfortunately he did not appear yesterday nor he appeared today when the matter is called out for final hearing. Perused the record, impugned judgment, prosecution evidence and proceeding of the trial Court with the help of Mrs. Bhosale, the learned APP.

3. Prosecution case in brief, is that the prosecutrix a girl, aged about 18 years, came to Bombay alongwith her brother P.W.2 Mohammed Khan and mother P.W.3 Husna from Gauriganj, District Gonda in U.P. to Mumbai. As they had no place of residence in Bombay and as the appellant, who was residing behind the mosque at Bainganwadi, Govandi, also hails from the same village and was known to the prosecutrix and her family, they took shelter in his house. They lived in his house from November, 1998 to January, 1999. On 10th February, 1999 wife and children of the accused came back from their native place and about 8 days before that the prosecutrix, her mother and brother left the house of the accused and went to live at Indira Nagar Hutment in the same area. According to the prosecution, next day after the prosecutrix, her mother and brother had come to live in the house of the accused, her brother went to find out some work while her mother went to the market. Finding that the prosecutrix was alone at the house, the accused appellant approached her and began to chit-chat

with her. While chitchatting he offered to marry her but she declined. However, the accused hugged her and felled her on the ground and thereafter forcibly committed rape on her. After the act was completed, he went away. On that day the prosecutrix did not tell about this incident either to her mother or anybody else. During their stay in that house for a period of 3 months, the accused committed rape on her repeatedly by giving a promise of marriage. This fact was not disclosed to anybody by the prosecutrix. On 11-4-1999 she began to feel abdominal pain and was taken to private doctor and on examination, it was revealed that she was pregnant for 5 months. After that she disclosed the above fact to her mother and brother. Then all these persons went to the house of the accused and told him about pregnancy and asked him to marry the prosecutrix. He took one week’s time to consider but as he did not agree to marry, on 19-4-1999 the prosecutrix lodged a report at Shivaji Nagar Police Station on the basis of which crime no.71 of 1999 came to be registered. After registration of the offence, she was referred to the medical officer and on examination he found that she was pregnant for 24 weeks. After investigation chargesheet was filed and the case was committed to the Court of Sessions for trial.

4. Charge was framed against the accused for the offences punishable under Section 376 of the I.P.C. He pleaded not guilty. He denied that he had committed rape on the prosecutrix or that he had sexual intercourse with her. According to him, she was already pregnant for one month when she had come from village to Mumbai and later on her mother pressurised him to marry her but because he declined, the false report was lodged against him.

5. On behalf of the prosecution in all five witnesses were examined. Relying upon the testimony of the prosecutrix, the learned trial Court convicted and sentenced the accused as stated above.

6. The prosecutrix, who is P.W.1, deposed the above facts in her evidence. According to her on the next day after they had come to live at the house of the accused, her brother had gone out to seek work while her mother had gone to the market. Finding her alone at the house accused came into the house and committed rape on her and also threatened. Therefore, she did not disclose this fact to anybody. After that within a period of one month, he committed rape on her on 3 or 4 occasions. Due to the threats given by the accused and

because they had no other shelter to live, she did not disclose the fact to her mother. According to her later on she began to feel pain and was taken to private doctor, who disclosed that she was pregnant for three months. After that she disclosed before her mother that the accused had sexual intercourse with her. After that she and her mother approached the accused and requested him to marry her but he refused on the ground that he was already married. According to her, she was taken to the police station Shivaji Nagar where she lodged the report in the month of May, 1999. However it appears that report Exhibit-8 was lodged by her on 19.04.1999. She does not appear to be well conversant about dates and months.

7. Evidence of P.W.4 Dr. Vijay Kelwekar, who was Medical Officer attached to Police Hospital, Nagpada, deposed that he had examined the prosecutrix on 20.04.1999 and as per the history given by the girl she was raped about 5 months prior to the examination. However on physical examination he found that foetal height was of 24 weeks and abdominal pain was felt by the prosecutrix. He came to a conclusion that in view of the physical examination and the history given, she was pregnant for 24 weeks. This fact is not much disputed. As she was examined on 20th April, 1999 and

she was found pregnant for 24 weeks pregnancy relates back to the month of October or atleast it can be stated that her last menses had occurred in the month of October, 1998.

8. About the period during which they lived at the house of the accused, there is discrepancy. The prosecutrix herself did not state anything about the month during which they had lived at the house of the accused. However, her brother P.W.2 Mohammed Khan deposed that they were living in the house of the accused from December, 1998 to March, 1999. On the other hand, their mother P.W.3 Husna deposed that they had lived in the house of the accused from November, 1998 to January, 1999. In the F.I.R. also same period is given. If they went to live in the house of the accused in December, 1998, undoubtedly it has to be held that she was pregnant before she came to live in that house and if they came to live in that house in November, 1998 still it is doubtful whether she was pregnant before coming to that house or became pregnant afterwards.

9. P.W.4 Dr.Kelvekar admitted that he had not advised D.N.A. Test. The learned trial Court noted that neither the prosecutrix deposed nor any material

was placed on record to show that she had given birth to the child. In absence of D.N.A. test except the bare words of the prosecutrix, there is no evidence to establish that the accused had committed rape on her or had sexual intercourse with her from time to time. Even though in her evidence before the Court she deposed that because of the threats given by the accused, she had not disclosed this fact to her mother or anybody else, in the F.I.R there is no mention of any threats given by the accused. On the other hand, in the F.I.R. it is mentioned that on the first occasion, accused hugged her and thereafter he felled her on the ground and forcibly had sexual intercourse with her. However, in the F.I.R. she also stated that thereafter during their stay in the house from time to time he used to have sexual intercourse with her by giving promise of marriage. In view of this, possibility of her consent can not be ruled out. Her conduct in keeping silent for a period of 5 months and not disclosing the fact to anybody including her mother creates suspicion about herself. The learned trial Court noted that because she had no other place to live and because they were living in the house of the accused and because he had given threats, she did not disclose the facts and, therefore, her testimony before the Court is reliable. It is material to note that as per the F.I.R. her age was 18 years but

as per her admission in cross-examination and the medical evidence, her age was 17 years, when the alleged incident occurred. If she had become pregnant in the month of November, she must have come to know about this immediately after she missed her next menses. It is difficult to believe that if the accused had committed rape on her, she would keep silent and would not disclose the fact even to her mother even after knowing that she had become pregnant. Pregnancy could not be concealed for a long period and it appears that they lodged report, when she was in advanced stage of pregnancy of 24 weeks. It is also difficult to believe that her mother could not notice the developments in the physique of the prosecutrix in view of the stage of pregnancy.

10. It is now well settled that in the case of rape, the conviction can be based on the sole testimony of the prosecutrix if her testimony is found trustworthy and reliable and there are no circumstances which would cast doubt on her veracity. In **Sudhansu Sekhar Sahoo v. The State of Orissa 2003 Supreme Court Cases (Cri) 1484,** the Supreme Court observed as follows in paragraph 11 and 17:

"11. It is true that the sole testimony of the

> victim of a sexual offence can be a basis for conviction provided it is safe, reliable and worthy of acceptance. This Court had occasion, in many cases, to consider the nature of evidence required when the conviction was mainly based on the testimony of the victim of a sexual offence.
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> 17. It is well settled that in rape cases the conviction can be solely based on the evidence of the victim, provided such evidence inspires confidence in the mind of the court. The victim is not treated as an accomplice, but could only be characterised as injured witness. It is also reasonable to assume that no woman would falsely implicate a person in a sexual offence as the honour and prestige of that woman also would be at stake. However, the evidence of the prosecution shall be cogent and convincing and if there is any supporting material likely to be available, then the rule of prudence requires that evidence of the victim may be supported by such corroborative material."

In **Vimal Suresh Kamble v. Chaluverapinake Apal S.P. and another 2003 Criminal Law Journal 910,** the Supreme Court observed as follows in paragraph 21:

> "On an overall appreciation of the evidence of the prosecutrix and her conduct we have come to the conclusion that P.W.1 is not a reliable witness. We, therefore, concur with the view of the High Court that a conviction cannot be safely based upon the evidence of the prosecutrix alone. It is no doubt true that in law the conviction of an accused on the basis of the testimony of the prosecutrix alone is permissible, but that is in a case where the evidence of the prosecutrix inspires confidence and appears to be natural and truthful. The evidence of the prosecutrix in this case is not of such quality, and there is no other evidence on record which may even lend some assurance, short of corroboration that she is making a

truthful statement...."

In **Ramdas & Ors. v. State of Maharashtra AIR 2007 Supreme Court 155,** the Supreme Court observed as follows in paragraph 22:

> "It is no doubt true that the conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity. If the evidence of the prosecutrix is of such quality that may be sufficient to sustain an order of conviction solely on the basis of her testimony. In the instant case we do not find her evidence to be of such quality.

11. In view of the legal position settled in a large number of cases, the conviction in the case of rape can be based solely on the testimony of the prosecutrix, provided the Court is convinced about the truthfulness of the prosecutrix and there are no circumstances to doubt or suspect her own conduct and veracity. If her evidence is truthful and of such quality, then only conviction can be based on her testimony alone. In the present case as pointed out above, evidence of the prosecutrix is not of such a quality which will inspire confidence nor there is any other evidence which would lend some assurance that her evidence is truthful.

12. Taking into consideration the legal position and the evidence in its totality, I find that the prosecution has failed to prove beyond reasonable doubt that the accused had committed rape on the prosecutrix. At least he is entitled to get benefit of doubt. In the result, impugned judgment and order of conviction and sentence are liable to be set aside.

13. For the aforesaid reasons , appeal is allowed Impugned judgment and order of conviction and sentence are hereby set aside. Accused is acquitted and he be set at liberty forthwith, if not required in any other case.

(J.H.Bhatia,J.)